A

HYT FOOD INDUSTRIES SDN BHD

v.

ELKEN SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R4-12B-966-2010]
28 DECEMBER 2010

C ***CONTRACT:*** *Oral agreement - Existence of oral agreement - Proof of - Whether sufficient evidence of oral agreement existed - Whether oral representation created a mutual understanding between parties*

D ***CONTRACT:*** *Breach - Damages - Refusal to accept delivery of goods - Cost of raw and packaging materials - Loss of profit - General and special damages - Whether respondent liable to pay damages for losses suffered by appellant*

E ***EVIDENCE:*** *Adverse inference - Failure to call witness - Proof of oral representation - Burden of proof upon whom - Whether trial judge erred in law and in fact - Whether trial judge was correct to invoke adverse inference by virtue of Evidence Act 1950, s. 114(g)*

F ***EVIDENCE:*** *Documentary evidence - Admissibility of - Document relied upon as proof of fact pleaded - Handwritten note purportedly made by respondent's witness - Contrast with purchase order - Whether note contradicted purchase order - Whether respondent could rely on note as proof that its order could be adjusted or reduced if sale was not good - Whether trial judge erred by relying on note*

G This was an appeal against the Sessions Court's decision, dismissing the appellant's claim against the respondent for loss of profit and special damages. Initially, the respondent had ordered 100,000 boxes of moon cakes from the appellant. The packaging materials including the wooden box, paper carrier bag, wrapper,

H knife and sticker for the box bore the exclusive design of the respondent. The moon cakes were delivered to the respondent in stages. As the sale of moon cakes was below the respondent's expectation, the respondent asked the appellant to stop production at 62,000 boxes. The appellant, through its managing

I director ('SP1'), agreed to stop production but maintained its

stand that the respondent was liable to pay for the cost of raw materials and packaging materials which were ordered earlier to meet the respondent's demand.

The appellant pleaded that the respondent had breached the purchase order when it refused to take delivery of 29,836 boxes of moon cakes. As a result of the breach, the appellant alleged that it suffered losses in terms of profit and expenses incurred to purchase the raw materials and packaging materials. They claimed damages for the sum of RM200,623.28 from the respondent. The respondent denied that it breached the purchase order and claimed that the appellant's sales representative, Miss Tan, made an oral representation which created a mutual understanding between the parties or collateral contract side by side with the purchase order that the final figures could be adjusted or reduced if the sale was not good. The court had to decide on two issues: (i) whether there was a collateral contract side by side with the purchase order; and (ii) whether the respondent was liable to pay damages to the appellant.

Held (allowing the appeal with costs):

(1) The burden of proving the existence of the collateral contract was on the respondent who relied heavily on the oral representation allegedly made by Miss Tan. Pursuant to s. 101 and s. 102 Evidence Act 1950 ('the Act'), the respondent had to call Miss Tan to prove the existence of the oral representation. As the respondent failed to call Miss Tan, it failed to discharge the burden of proof placed upon it. *(Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd; Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor)*. (foll) (para 11)

(2) The trial judge erroneously invoked the adverse inference under s. 114(g) of the Act against the appellant for failure to call Miss Tan. The burden of proof did not shift to the appellant to rebut the allegation of oral representation. Mere failure to produce a witness does not automatically invite s. 114(g). There must be an element of suppression of material evidence, which was not the case here. The purchase order was clear and should be the sole contract that bound both parties. (para 11)

(3) The respondent relied on a handwritten note, which was a self-serving document purportedly made by their witness after a discussion with Miss Tan, but without her signature of confirmation. That note contradicted the purchase order particularly the quantity, and should there be any queries, it should have been addressed to SP1 instead of Miss Tan. The trial judge failed to test the note against the purchase order. If there was a mutual agreement that the production could be reduced if sales were not good, it was only proper that such condition was put into writing in the purchase order itself. The trial judge did not take into consideration the fact that the packaging materials for the moon cakes had to be ordered earlier. The approach of looking at the note alone was wrong. The whole circumstances of the case must be looked at. (paras 12 & 13)

(4) The alleged collateral contract of reduction in quantity and stop production contradicted the agreed terms in the purchase order. The circumstances leading to the existence of the collateral contract was full of doubt and was created by the respondent unilaterally after they found out that they were not able to sell 100,000 boxes of moon cakes. As far as sales were concerned, it would always be a risk taken by the seller. The respondent should have surveyed the market demand before placing the order of 100,000 boxes with the appellant instead of asking the appellant to stop production after the appellant had completed their part of the bargain. (para 15)

(5) On the facts and circumstances of this case, it was found that the existence of the collateral contract was not proven. Such collateral contract, which contradicted the terms in the purchase order, should not be allowed to be introduced. With the collateral contract not proven, it was clear that the respondent had breached the contract when they cancelled 29,836 boxes of moon cakes and, thus, liable to pay damages. (para 15)

(6) The evidence led by SP1 showed that the appellant made a profit of RM2.50 to RM3 per box of moon cakes. That being the case, for 29,836 boxes cancelled, the total loss of profit would be between RM74,590 to RM89,508. The cost of raw materials, packaging materials and loss of profit were losses

that naturally arose from such a breach of contract. The respondent also knew that its breach of contract would likely to result in such losses. On a balance of probability, it was found that there was ample evidence adduced by the appellant to prove its losses. (para 16)

[Decision of trial judge set aside and substituted with judgment for the appellant as prayed for in statement of claim with general damages for loss of profit in the sum of RM74,590.]

Case(s) referred to:

Seven Seas Industries Sdn Bhd v. Philip Electronic Supplies (M) Sdn Bhd & Anor [2008] 4 CLJ 217 CA ***(foll)***

Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd [1993] 1 LNS 96 HC ***(foll)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 114(g)

For the appellant - En Gunavathy; M/s Wilson Wong & Tan
For the respondent - Cik Jayshree (En LS Bong with him); M/s Cheah Teh & Su

Reported by Melanie Murthy

JUDGMENT

Hadhariah Syed Ismail JC:

The Appeal

[1] This is an appeal against the decision of the learned Sessions Court Judge of Kuala Lumpur who on 19 August 2010 had dismissed with cost the appellant's/plaintiff's claim against the respondent/defendant for loss of profit and special damages. On 29 December 2010, I allowed the appeal, set aside the decision of the Session's Court and substituted thereof with judgment for the appellant. The respondent appealed to the Court of Appeal against my decision.

Agreed Facts

[2] From the pleadings and oral testimonies before the court, the following facts are not disputed:

1. *Vide* a Purchase Order No. 15653 dated 6 June 2005, the respondent ordered from the appellant 100,000 boxes of Moon Cakes Gift Set at a price of RM18 per box. Each box to contain four pieces of moon cakes with each individual piece is packed in a clear tray with laminated printed wrapper, product stickers, an oxygen absorber and a plastic knife.

2. The packaging materials including the wooden box, paper carrier bag, the wrapper, the knife and the sticker for the box must bear the exclusive design of Elken Sdn Bhd.

3. Dates of delivery and quantity to be delivered are as below:

   (a) 1 July 2005 – 15,000 boxes

   (b) 15 July 2005 – 15,000 boxes

   (c) 1 August 2005 – 20,000 boxes

   (d) 15 August 2005 – 30,000 boxes

   (e) 21 August 2005 – 20,000 boxes

4. 62,000 boxes have been delivered to the respondent and had been paid for.

Disputed Facts

[3] As the sale of moon cakes is below expectation of the respondent, they asked the appellant to stop production at 62,000 units. The cut off date is said to be 16 August 2005. The appellant, through its Managing Director, SP1 agreed to stop production. But *via* an email dated 18 August 2005, SP1 informed the respondent that 100,000 boxes and 100,000 paper bags have been produced and cooked paste for 11,000 boxes already prepared and requested the respondent to allow the appellant to deliver 73,000 boxes before they stop production. There was no reply by the respondent. The appellant maintained their stand that the respondent is liable to pay the appellant the cost of the raw materials as well as the packaging materials which had to be ordered earlier to meet the respondent's demand. It is the appellant's pleaded case that the respondent had breached the purchase order when they refused to take delivery of 29,836 boxes of moon cakes. As a result of the breach, the appellant alleged they have suffered losses in terms of loss of profit as well

as expenses incurred to purchase raw materials and materials for packaging. *Vide* this action, the appellant claim against the respondent for:

(a) General damages for loss of profit.

(b) Special damages of RM200,623.28 made up of:

Item	Quantity	Price
(i) wooden box for Elken moon cakes (red and orange colour)	29,836 boxes	RM149,180
(ii) Elken paper bag	29,836 units	RM13,426
(iii) lken wrapper	45 rolls	RM32,850
(iv) Plastic knife with Elken logo	29,836 pieces	RM2,386
(v) Elken seal	29,836 pieces	RM328
(vi) Moon cakes stickers	124,000 pieces	RM1,736
(vii) knife holder	29,836 pieces	RM716.20
	Total	**RM200,623.28**

(c) Interest

(d) Cost

[4] The respondent denied they had breached the purchase order. Their pleaded defence was prior to the issuance of the purchase order, the appellant's sales representative, one Miss Tan had made an oral representation to the respondent that;

(i) the respondent will issue the purchase order for 100,000 boxes of moon cakes but will be entitled to reduce the intended purchase if the respondent subsequently discovered that the market was not good.

A (ii) the appellant will stop production of the moon cakes provided that the respondent informed the appellant one month before the Moon Cake Festival on 18 September 2005 in which event the appellant will not hold the respondent to the purchase order for 100,000 boxes.

B

[5] Acting on the oral representation and based on the said understanding, the respondent alleged there was a mutual understanding between the parties or collateral contract side by side with the purchase order that the final figures can be C adjusted and reduced if the sale is not good. It was also in those circumstances that the respondent further alleged the parties had a meeting on 14 August 2005 or 15 August 2005 to reduce the quantity, stop production and the respondent is not liable for the appellant's losses.

D

[6] Decision Of Session Judge

1. There was a collateral contract existing side by side to the purchase order.

E 2. Miss Tan had an ostensible authority to negotiate with the respondent.

3. Adverse inference invoked against the appellant for failure to call Miss Tan.

F 4. Contemporaneous documents and deliveries made in stages show parties agreed respondent can cancelled the order provided one month prior notice is given.

Grounds Of Appeal

G

[7] The Session Judge is said to have erred in facts and law in deciding:

1. There was a collateral contract which exists side by side to the Purchase Order No. 15653.

H

2. Miss Tan as the appellant's sales representative had an ostensible authority to make an oral representation that bind the appellant.

I 3. Exhibit D122 has proved the existence of oral representation by Miss Tan.

4. The existence of collateral contract is supported by the mode of deliveries of the moon cakes which was in stages.

Issues

[8] Two issues to be decided by the court are:

1. Whether there was a collateral contract side by side with the purchase order?

2. Whether the respondent is liable to pay damages to the appellant?

The Law On Collateral Contract

[9] If the contract entered into between the parties is in writing, it is trite law that parties are bound by the terms of the contract. It is also trite law that court had to give effect to the bargain made by the parties. So, if one party alleged although the written contract say one thing, nevertheless parties have orally agreed on something else, how does court approach this issue of collateral contract? A case on point is found in *Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd* [1993] 1 LNS 96, wherein Visu Sinnadurai J states:

> a cautious approach is adopted by the courts in recognizing the existence of a collateral contract, especially in cases where it contradicts the terms of a written contract. The burden of proving the existence of a collateral contract is on the party alleging the existence.

[10] The same cautious approach was adopted by Court of Appeal in *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217, where it was held:

> the doctrine of collateral contract or agreement is recognized by virtue of proviso to s. 92 Evidence Act 1950 which allowed to be admitted in evidence any separate oral agreement as to any matter on which a document was silent and which was not consistent with its term. Unless the additional evidence sought to be introduced fell within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add or subtract from the terms of the agreement. Such collateral agreement must be viewed strictly.

[11] Applying the above principles to the facts of this case, first of all, the burden of proving the existence of the said collateral contract lies on the respondent. Evidence led before the lower court revealed the respondent relied heavily on the oral representation allegedly made by the appellant's sales representative, Miss Tan. Pursuant to s. 101 and 102 of the Evidence Act 1950, the respondent had to call Miss Tan to prove in the affirmative the existence of the so called oral representation. This they have failed to do. Miss Tan was said to have left the appellant's employment and her whereabout is not known. Thus, she could not be called to give evidence. The respondent failed to discharge the burden of proof placed upon them. Unfortunately, the learned Sessions Judge erroneously invoke adverse inference under s. 114(g) Evidence Act 1950 against the appellant for failure to call Miss Tan. The burden of proof never shift to the appellant to rebut the allegation of oral representation. There is a long line of authorities which held that mere failure to produce a witness does not automatically invite s. 114(g). There must be an element of suppression of material evidence. It was not the case here. The purchase order is clear and should be the sole contract that binds both parties.

[12] In furtherance to the alleged collateral contract, the respondent also relied on a handwritten note purportedly made by their witness, SD1 after a discussion with Miss Tan. This note is marked as D122 and found on p. 365 of the appeal record. D122 is dated 8 June 2005, two days after the purchase order was signed. Paragraph 4 of D122 is relevant to this appeal and it reads:

> Condition of supply – agreed to stop production if sales is not good – 1 month before Festival date.

[13] My first impression after reading D122 is this. Anyone can write D122 at any time. This is a self-serving document. There was no signature of confirmation by the appellant's representative, Miss Tan although it was mentioned that the letter was made as a result of a discussion with her. This D122 contradicts the material terms agreed upon in the purchase order in particular the quantity and should there be any query, it should be addressed to SP1 who is the Managing Director and not Miss Tan. I find it difficult to accept the respondent's version that Miss Tan can unilaterally and easily agree to stop production if sales is not good

after the purchase order has been signed and the appellant had committed to purchase raw materials and packaging materials for 100,000.000 boxes of moon cakes without first getting the approval of SP1? I find it strange that the trial judge accepted D122 as sufficient to prove the existence of oral representation by Miss Tan. The trial judge did not test D122 against the purchase order. If indeed there was a mutual agreement that production can be reduced if sales is not good, it is only proper that such a condition is put in writing in the purchase order itself. On the same note, the trial judge did not take into consideration the facts that packaging for the moon cakes had to be ordered earlier. Her approach of looking at D122 alone is wrong. The whole circumstances of the case must be looked at.

[14] To further support their contention of the existence of the collateral contract, the respondent relied on the fact that deliveries of the moon cakes are made in stages. I find this contention had no merit whatsoever. In view of the large quantities to be delivered, it is only reasonable for parties to agree for deliveries to be made in stages. But the manner of delivery can never be taken to mean the respondent can ask the appellant to stop production as and when they feel the sale is not good. One thing that the respondent must not forget is the moon cakes are specially ordered by them and its packaging from the wooden box, paper bag, plastic knife and the wrappers are exclusively designed with the respondent's name and logo. The appellant had to order the raw materials and packaging materials in early July 2005 to meet the respondent's purchase. It is impossible for the appellant to order these materials in stages, depending on the sale made by the respondent.

[15] Having considered the totality of evidence, I am more inclined to adopt the strict approach in determining whether there was a collateral contract. In this case, I find the alleged collateral contract of reduction in quantity and stop production contradicts the agreed terms in the purchase order. The circumstances leading to the existence of the collateral contract is full of doubt and is created by the respondent unilaterally after they found out they are not able to sell 100,000 boxes of moon cakes. As far as sales is concerned, there is always risk taken by the seller. If the respondent over estimate the sale, they only had themselves to blame. The respondent should have surveyed the

market demand before placing the order of 100,000 boxes with the appellant and not ask the appellant to stop production after the appellant had completed their part of the bargain. On the facts and circumstances of this case, I find the existence of the collateral contract is not proven. Even if I am wrong on this finding, I further hold that such collateral contract which contradicts the terms in the purchase order should not be allowed to be introduced. With collateral contract not proven, it is clear the respondent had breached the contract when they cancelled 29,836 boxes of moon cakes. In the circumstances, the respondent is liable to pay to the appellant damages consequent to the breach.

Damages

[16] To prove they have paid various suppliers for the purchase of raw materials and packaging materials, the appellant produced bank statements from Public Bank Berhad which were marked as P57, P60, P66, P71, P74, P77, P83, P87 and P95. There is no doubt that the appellant had incurred these expenses to order 100,000 units of packaging materials. Otherwise they could not have produced and delivered 62,000 boxes of moon cakes as scheduled. With the refusal of the respondent to take delivery of 29,836 boxes of moon cakes, there is a balance of unused packaging materials purchased by the appellant as detailed in the statement of claim amounting to RM200,623.28. The appellant could not do anything with the wooden boxes to mitigate their losses because the boxes are tailor made and designed exclusively for the respondent. With regard to the loss of profit, evidence led by SP1 is the appellant made a profit of between RM2.50 to RM3 per box of moon cakes. This evidence was not challenged by the respondent. That being the case, for 29,836 boxes cancelled, the total loss of profit would be between RM74,590 to RM89,508. The cost of raw materials and packaging materials and loss of profit are losses that naturally arose when there is a breach of contract of this nature. The respondent also knew such losses would likely to result when they breached the contract. To conclude, on the balance of probability, I find there were ample evidence adduced by the appellant to prove their losses.

Conclusion

[17] Although court exercising appellate jurisdiction should be slow to interfere with the finding of facts made by a trial court, I find in this particular case the trial judge had failed to take into account the fact that the collateral contract contradicts the terms agreed in the purchase order and should not be allowed to be introduced to defeat the appellant's claim.

[18] In the circumstances, I allowed the appeal with costs. The decision of the Sessions Judge is set aside and substituted thereof with a judgment for the appellant as prayed for in the statement of claim with general damages for loss of profit in the sum of RM74,590.